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NO. 86-1115

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE LOUISIANA LAND
AND EXPLORATION COMPANY,

Petitioner,

V.

TEXACO INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Section 105 of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. § 3315, applies to all natural gas sold in intrastate commerce under existing contracts or applies only to gas sold under contracts that expressly dedicate specific supplies of gas to the contracts.

LIST OF AFFILIATES AND SUBSIDIARIES OF TEXACO INC.

The affiliates and subsidiaries of Texaco Inc. listed on its most recent Form 10-K filed with the Securities and Exchange Commission are as follows:

Getty Oil Company
Getty Pipeline, Inc.
Riverway Gas Pipeline Company
Texaco Oils Inc.
Texaco Producing Inc.
Texaco Refining and Marketing Inc.
Texaco Trading and Transportation Inc.
The Texas Pipe Line Company
Deutsche Texaco AG
Norsk Texaco Oil A/S
S.A. Texaco Belgium N.V.
S.A. Texaco Petroleum N.V.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco (Ireland) Limited
Texaco Limited
Texaco North Sea U.K. Company
Texaco Oil Aktiebolag
Texaco Petroleum Maatschappij (Nederland) B.V.
Refineria Panama S.A.
Refineria Texaco de Honduras, S.A.
Texaco Brasil S.A.-Produtos de Petroleo
Texaco Caribbean Inc.
Texaco Nigeria Limited
Texaco Panama Inc.
Texaco Petroleum Company
Texaco Trinidad, Inc.
Texas Petroleum Company

Texaco Butadiene Company
Texaco Chemical Company
Canadian Reserve Oil and Gas Ltd.
Texaco Canada Inc.
Texaco Canada Resources Ltd.
Getty Marine Corporation
Texaco International Trader Inc.
Texaco Overseas Holdings Inc.
Texaco Overseas Petroleum Company
Texaco Overseas Tankship Ltd.

TABLE OF CONTENTS

QUESTION PRESENTED.....i
LIST OF AFFILIATES AND SUBSIDIARIES OF TEXACO INC.....ii
TABLE OF CONTENTS.....iv
TABLE OF AUTHORITIES.....v
STATEMENT OF THE CASE.....1
REASONS FOR DENYING THE WRIT.....4

1. The Decision Below Does Not Raise An Important Question Concerning The Meaning And Administration Of The Natural Gas Policy Act.....4

2. The Decision Below Does Not Conflict With Any Authoritative Interpretation From A Federal Agency Responsible For Administering The NGPA.....7

3. The Decision Below Is Correct.....9

CONCLUSION.....13

TABLE OF AUTHORITIES

CASES — Page

Amoco Production Co. v. Hodel, 627 F. Supp. 1375 (W.D. La. 1986), *appeal docketed*, No. 86-4168 (5th Cir. Mar. 11, 1986) 7-8,10

Public Service Commission v. Mid-Louisiana Gas Co., 463 U.S. 319, 103 S.Ct. 3024, 77 L.Ed. 2d 668 (1983) 5

Shell Oil Co. v. Williams, Inc., 428 So.2d 798 (La. 1983) 2-3,13

STATUTES

Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3352, 15 U.S.C. §§ 3301-432 (1982) ..... passim

Section 102 (15 U.S.C. § 3312) 3,12

Section 104 (15 U.S.C. § 3314) 3,11

Section 105 (15 U.S.C. § 3315) ..... passim

Section 109 (15 U.S.C. § 3319) 3,4

30 U.S.C. § 226(a) 8

§ 1702 (15) 8

§ 1711(a) 8

§ 1711(c)(1) 8

§ 1751(a) 8

43 U.S.C. § 1331(b) 8

§ 1334(a) 8

§ 1451 8

§ 1457 8

FEDERAL REGULATIONS

18 C.F.R. § 385.1901 9
§ 385.1901g(3) and (6) 9
43 C.F.R. § 1.2(a) 8
§ 4.1(b)(3) 8
§ 4.400 8
§ 3000.0-5(n) 8
§ 3103.1-1 8
§ 3103.1-2(b) 8

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NO. 86-1115

LOUISIANA LAND AND EXPLORATION COMPANY,
Petitioner,

VERSUS

TEXACO INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

BRIEF IN OPPOSITION

Texaco Inc. ("Texaco") opposes the petition for writ of certiorari filed by the Louisiana Land and Exploration Company ("LL&E") seeking review of the judgment of the Supreme Court of Louisiana.

STATEMENT OF THE CASE

This case concerns royalty obligations under several Louisiana contracts and leases (hereafter, "the leases") between LL&E and Texaco, all of which are governed by Louisiana law. Royalties have been consistently paid by Texaco to LL&E under the leases for more than thirty years based upon a percentage of the proceeds received by Texaco from its sale of gas produced from the leases under warranty contracts. From the early 1950's until October, 1981, LL&E accepted those royalties without dissent concerning the amount received or the manner of its calculation. In July, 1982, LL&E filed suit in the state district court seeking additional royalties and other relief.

LL&E contends in this litigation that in all of the eleven contracts at issue, the royalty clauses provide for payment of royalties on market value and that Texaco has not paid royalties on the market value of the gas. Texaco contends, to the contrary, that the leases provide for payment of royalties on proceeds of the sale of the natural gas and Texaco has paid royalties on those proceeds. Texaco further contends that, without regard to the terms of the leases, market value and proceeds are equivalent, as a matter of law, for the gas in dispute in the proceeding below.[1] This equivalence of market value and proceeds provided one of several defenses available to Texaco and is the only such defense that has actually been adjudicated below.

The equivalence between the market value of the disputed gas and the proceeds of its sale results from the application of both Louisiana and federal law. Under Louisiana law, market value on which royalty is owed may not exceed the maximum lawful price applicable to the gas under federal law. *Shell Oil Company v. Williams, Inc.*, 428 So.2d 798 (La. 1983). In *Williams* the Louisiana Supreme Court concluded that a gas producer could not be expected to market natural gas at an illegal price and, therefore, held that legal ceilings imposed on the sales price were also ceilings on the market value of the gas.[2]

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[1] The judgment rendered by the Louisiana Supreme Court granted a motion for partial summary judgment in Texaco's favor. This judgment concerns only disputed gas that was being sold under warranty contracts on November 8, 1978, the day before the date of enactment of the NGPA.

[2] LL&E has agreed that "under Louisiana law any applicable federal price ceiling would limit the value of natural gas for royalty purposes." Petition for a Writ of Certiorari to the Supreme Court of Louisiana (hereafter, "Pet.") at 6-7.

Relying on *Williams,* Texaco filed a motion for partial summary judgment in the trial court showing that Section 105 of the NGPA[3] governs the disputed gas and incorporates as a ceiling price for this gas the contract price of the existing contracts under which the gas was sold.[4] Texaco has consistently paid royalty on the proceeds, that is, on the contract price. Since, under Section 105, market value and proceeds are identical for this disputed gas, Texaco has fulfilled its royalty obligations, regardless of the interpretation of the royalty clauses of the LL&E contracts.

LL&E contended that the disputed gas was not governed by Section 105 because the gas was sold under warranty contracts, rather than dedication contracts.[5] It argued that the gas is governed by Section 109, a catch-all pricing provision applicable only to gas "not covered by any maximum lawful price under any other section." 15 U.S.C. § 3319. The Section 109 price is higher than the price under the warranty contracts at issue and equivalent to the Section 104 (post-1974) price.

Commissioner and Judge Ad Hoc Holahan rejected LL&E's proposed distinction under the NGPA between treatment of gas sold under intrastate warranty contracts and gas sold under intrastate dedication contracts. In his

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[3] 15 U.S.C. § 3315. This statutory provision will be referred to herein as "Section 105 of the NGPA" without further citation to the United States Code.

[4] Under its terms, Section 105 applies to gas sold under existing intrastate contracts on the day before the date of the NGPA's enactment. It provides a ceiling price of the lower of the Section 102 price or the price provided in the contracts to which the gas was subject on the day of enactment of the NGPA. The contract prices in this case were lower than the Section 102 price.

[5] A warranty contract is one in which no specific gas reserves are expressly dedicated to the contract by the seller. Rather, the seller warrants that it will sell the volumes provided by the contract to the purchaser. A dedication contract is one in which specific reserves of gas are dedicated to the contract.

opinion, he held Section 105 to be clearly applicable to the disputed gas as old intrastate gas flowing at the time of the enactment of the NGPA and sold under an existing contract at that time. The Commissioner's recommended judgment was not signed by the district court, however, which ruled instead that Section 109 of the NGPA was applicable. The district court was affirmed by the Louisiana Fourth Circuit Court of Appeal.

The Louisiana Supreme Court exercised its discretion to hear the matter on Texaco's petition for writs. It reversed the lower courts and held that Section 105 of the NGPA governs the disputed gas because that gas was sold under existing intrastate contracts on the day before enactment of the NGPA. All of the opinions rendered below are included in appendices to LL&E's petition.

REASONS FOR DENYING THE WRIT

LL&E has failed to present this Court with special and important reasons to exercise its judicial discretion in granting the requested writ.

1. The Decision Below Does Not Raise An Important Question Concerning The Meaning And Administration Of The Natural Gas Policy Act.

The question that LL&E seeks to have reviewed, in its simplest terms, is whether Section 105 of the NGPA excludes from its coverage natural gas sold under warranty contracts so that such gas is governed by Section 109 of the NGPA. This is a question that has not been addressed by this Court. However, given the size of the United States Code (and the constant activity of Congress), there are

inevitably numerous such federal law questions of first impression. This question concerns only one specific type of natural gas contract and only one of the eight pricing provisions of the NGPA; it arises only in a state contract law case in which the ultimate question is whether a mineral lessee has fulfilled its royalty obligation under the lease.

In an effort to create the impression that this narrow question is not merely undecided but also of great importance, LL&E, nevertheless states that it "goes to the very heart of the policy underlying the NGPA." According to LL&E, a primary purpose of the NGPA was elimination of disparity between interstate gas prices and the "generally higher" intrastate gas prices in order to alleviate severe gas shortages in the interstate market. At the time, a shortage of natural gas in the interstate market had developed because intrastate prices were not subject to regulation and had, in many instances, risen above the regulated interstate prices. This disparity created a disincentive for producers to sell in the interstate market and prevented new supplies of gas that were not already dedicated to interstate commerce from entering the interstate market. The initiation of regulation on intrastate pricing and the provision for interstate prices to rise to levels that could compete with the prevailing intrastate market addressed this shortage and this disincentive. Pet. at 10.

LL&E's statement that Congress intended to reduce or eliminate the disparity between interstate and intrastate prices and alleviate a gas shortage in the interstate market is essentially correct, as far as it goes.[6] As LL&E admits,

[6] This Court has recently elaborated more fully on the background and purposes of the NGPA. *See Public Service Commission v. Mid-Louisiana Gas Company*, 463 U.S. 319, 103 S.Ct. 3024, 77 L.Ed.2d 668 (1983).

this purpose was to be accomplished through a congressional policy "to hold intrastate sellers of flowing gas to bargains reached before date of enactment" of the NGPA. Pet. at 11. The decision of the Louisiana Supreme Court directly follows this policy since it interprets Section 105 of the NGPA to hold Texaco, as seller of the disputed gas, to the bargains it had struck prior to the enactment of the NGPA. LL&E asserts that the decision below "frustrates" that policy, Pet. at 11, but fails to explain or support that assertion.

LL&E proposes a statutory interpretation that, rather than eliminating market disparities, creates additional disparities in intrastate gas pricing by establishing different ceilings for intrastate gas depending upon whether (on the critical date statutorily provided) it was sold under warranty contracts or under dedication contracts. LL&E supplies no rationale for this strange reading of national policy and no authority in support of it in statutory language or legislative history.[7] To the contrary, neither the term "warranty contract" nor the term "dedication contract" appears in Section 105 or the legislative history concerning Section 105.

As further indicia of the importance of the issue of whether Section 105 governs gas sold under existing

[7] LL&E's secondary contention that the Louisiana Supreme Court decision interferes with administrative clarity and with the desire of Congress to reduce administrative burden is equally unpersuasive. Pricing of natural gas under Section 105 of the NGPA is self-implementing; it creates no regulatory burden or confusion.

warranty contracts, LL&E refers to other pending cases that purportedly present the same issue. Pet. at 12. In addition to *Amoco Production Company v. Hodel*, 627 F.Supp. 1375 (W.D. La. 1986), already on appeal in the United States Court of Appeals for the Fifth Circuit, LL&E lists eleven cases pending in Louisiana state district courts and one pending in a Texas state court.

Rather than supporting nationwide importance of the issue, LL&E's citation to pending controversies illustrates the limited impact of the ruling below. Although the NGPA has been in effect for eight years, LL&E is able to refer this Court to only thirteen lawsuits, involving three different producers and pending in two different states, that concern the issue of whether gas sold under warranty contracts is governed by Section 105 of the NGPA. LL&E likewise does not support its suggestion that the issue is of increasing importance, since most of the cited litigation was initially filed more than six years ago.[8]

2. The Decision Below Does Not Conflict With Any Authoritative Interpretation From A Federal Agency Responsible For Administering The NGPA.

LL&E states that the decision below "is contrary to the rulings ... of the federal agencies--the Federal Energy Regulatory Commission and the Department of the Interior--charged with interpreting and applying the NGPA" and elaborates upon three such "rulings" at pages

[8] The instant suit was filed in 1982 and all of the cases cited in footnotes 10 and 11 of LL&E's petition were filed on either July 22 or August 6, 1980. Furthermore, the issue of whether Section 105 applies to gas sold under existing warranty contracts is necessarily of no greater magnitude than the number of such contracts still in effect. LL&E provides no information concerning that number, but the dearth of newly-instituted litigation on the issue suggests that all affected contracts may be in litigation.

14 and 15 of its petition. Pet. at 12. This argument, even taken at face value, is hardly a compelling basis for invoking this Court's discretionary review. Moreover, LL&E misstates the nature and overstates the significance of the conflicting "agency decisions." The supposed body of administrative precedent that the Louisiana Supreme Court declined to follow actually consists of two letter opinions issued *by the general counsel* of the Federal Energy Regulatory Commission ("FERC"), not by the FERC, and one Interior Board of Land Appeals ("IBLA") decision.

The IBLA decision is the same decision that was reversed on the Section 105 issue by the United States District Court for the Western District of Louisiana in *Amoco v. Hodel, supra.* The district court ruling is now under review in the United States Court of Appeals for the Fifth Circuit, as LL&E itself admits. Significantly, the IBLA is not an agency "charged with interpreting and applying the NGPA," as LL&E clearly implies. The *Amoco* matter came before the IBLA as an appeal of a decision of the Director of the Minerals Management Service ("MMS") concerning a royalty determination. Interpretation of Section 105 of the NGPA arose only as an incident to determination of proper royalty, just as it arose in the Louisiana Supreme Court in this matter. The IBLA has no statutory charge to interpret the NGPA.[9] Rather, the IBLA and the MMS are both divisions of the Department of Interior, which is charged with administration of public lands and minerals and deriving revenues therefrom.[10]

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[9] *See* 43 U.S.C. §§ 1331(b), 1334(a); 43 C.F.R. § 4.1(b)(3).

[10] 43 U.S.C. §§ 1451, 1457; 30 U.S.C. §§ 226(a), 1702(15), 1711(a), 1711(c)(1), 1751(a); 43 C.F.R §§ 1.2(a), 4.1 (b)(3), 4.400, 3000.0-5(n), 3103.1-1, 3103.1-2(b).

The authority to administer and interpret the NGPA resides in the FERC, as LL&E correctly notes. 15 U.S.C. § 3411. LL&E is incorrect, however, in characterizing the two letter opinions of the general counsel of the FERC as either "agency rulings" or "executive interpretations" of the FERC. Each letter opinion states that "the views expressed here are mine, as General Counsel, and do not bind the Commission in any manner." Pet. at 51a and 59a.[11] The individual views of the general counsel, which expressly do not bind the FERC, are clearly not agency decisions in any sense.[12] *See* 18 C.F.R. § 385.1901(g)(3) and (6). The FERC has carefully-delineated procedures for rendering official agency decisions but has rendered no such decisions interpreting Section 105 of the NGPA and its applicability to first sales under existing warranty contracts. *See generally,* 18 C.F.R. § 385.1901.

The strained efforts of LL&E to elevate the three decisions it cites into authoritative executive interpretations that conflict with the decision below appear to be a response to the fact that there is presently no conflict in the judicial decisions rendered on the issue, and there may never be such a conflict. The absence of any conflict in executive or judicial interpretations of the statute illustrates a further reason why this Court should not exercise its discretion to grant review.

3. The Decision Below Is Correct.

The ruling of the Louisiana Supreme Court rests on a straightforward interpretation of the clear statutory

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[11] In addition, the letter opinions expressly limit reliance on the interpretation stated therein to the addressee of the letter opinion and identified parties to the same transaction.

[12] In addition, the two cited general counsel opinions are in hopeless conflict. Compare situation C in the Nordhaus opinion, Pet. at 55a-56a, and the fourth category of gas discussed in the Moore opinion. Pet. at 49a-51a.

language of Section 105 of the NGPA.[13] That section's application paragraph, quoted in LL&E's petition at page 2, refers to gas "sold under *any* existing contract" without qualification of the type of contract.[14] Section 105(a) (emphasis added). Neither the application paragraph of Section 105 nor any other portion of the NGPA contains language distinguishing between dedication and warranty contracts. LL&E nevertheless attempts to draw such a distinction, relying on an expression in the pricing paragraph of Section 105, "the existing contract, to which such natural gas was subject on November 9, 1978," Section 105(b), as a cryptic description for "dedication contract." LL&E's position requires the further step that this supposed expression for "dedication contract" be implicitly read into the first paragraph of Section 105, the application paragraph, as a

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[13] LL&E attempts to weaken the Louisiana Supreme Court ruling by suggesting that one of its primary bases was the decision in *Amoco v. Hodel*, a nonfinal district court opinion that LL&E criticizes. Pet. at 8. For unexplained reasons, LL&E deems the Louisiana Supreme Court majority's purported reliance on this decision as important. The Louisiana Supreme Court indeed cited the *Amoco* decision in a single paragraph of discussion and expressed agreement with its interpretation of Section 105. Pet. at 9a. However, the federal district court opinion was neither a principal basis of the Louisiana ruling nor relied upon heavily by the Louisiana Supreme Court. Rather, the Louisiana decision was based on an independent analysis of the statutory language, the purposes of the NGPA, the legislative history of Section 105 and the court's sound conclusion that the disputed gas clearly met the requirements for application of Section 105 as a "first sale" under an "existing contract" in intrastate commerce.

[14] LL&E also erroneously suggests that the lower courts in Louisiana ruled that the gas sold pursuant to the Texaco warranty contracts was not "sold under" existing contracts within the meaning of Section 105. To the contrary, the district court conceded that the gas was indeed sold under existing contracts but further required express dedication of the gas to those contracts before it would apply Section 105 of the NGPA. The court of appeal implicitly accepted the finding that the gas was sold under the contracts but committed the same error as the district court. *See* the pertinent portion of the district court opinion, Pet. at 24a, and of the court of appeal opinion, Pet. at 18a.

limitation on the broad category of contracts under which gas was sold on November 8, 1978.

This interpretation simply does not accord with either common sense or the standards of statutory interpretation. The meaning of the statute must first be sought in its plain language, and the plain language of Section 105(a), entitled "Application," is a reference to any contract under which gas is sold, not a contract to which gas is dedicated or committed. In addition, despite express definitions of several types of contracts,[15] the NGPA fails to define either dedication contract or warranty contract, or to distinguish between the two.[16] The "subject to" expression found in Section 105(b), the pricing paragraph, is clearly no more than a cross-reference back to the contract under which the gas was sold, as the Louisiana Supreme Court understood.[17]

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[15] New contracts, rollover contracts, existing contracts and successors to existing contracts are defined in 15 U.S.C. §§ 3301(11), (12), (13), and (14), respectively.

[16] Furthermore, like the statute itself, the legislative history of the NGPA is devoid of any reference to dedication or warranty contracts or any evidence of an intent or reason to distinguish between them.

[17] LL&E's statement imputing to the Louisiana Supreme Court a view that "gas could be 'sold under' a warranty contract even if it could not be 'subject to' such a contract" is highly misleading. Pet. at 9. The Louisiana Supreme Court concluded that the sole test for applicability of Section 105 was whether gas was sold under an existing contract in intrastate commerce. In addition, that court indicated that gas sold under such existing contracts was likewise subject to those contracts and specifically stated that "the statute indicates that all old gas in production [a category that unquestionably includes LL&E's gas] would be the subject of a contract." Pet. at 10a. In any event, the Louisiana Supreme Court definitively rejected LL&E's contention that "subject to" means "dedicated or committed to." *Id.* at n.12. Thus, rather than expressing an opinion that gas could be sold under a contract even though not subject to that contract, the Louisiana court indicated that gas is subject to the contract under which it is sold.

Were the statutory language not sufficient to defeat LL&E's interpretation of Section 105, an analysis of the legislative policies and purposes of the NGPA is fatal to LL&E's contention. Texaco need not elaborate upon the history and purpose of the NGPA to this Court, which has itself addressed the subject in recent years. The widely acknowledged policies of elimination of a disparity between interstate and intrastate pricing, alleviation of gas shortages, and protection to consumers by maintenance of reasonable price ceilings on all gas (both interstate and intrastate) do not require different price ceilings for flowing intrastate gas depending on whether the gas was being sold under warranty contracts or dedication contracts. Nor are any of these policies in any way enhanced by imposing different price ceilings according to whether the gas is sold under warranty contracts or under dedication contracts.

No rational purpose is served by the warranty versus dedication contract distinction proposed by LL&E. The only function of such a distinction is to support LL&E's spurious claim for additional royalties on gas for which it has received fair royalties, as a percentage of the amount actually received by Texaco for the same gas, for decades.[18]

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[18] LL&E refers repeatedly to the unfairness or unjust penalties in the supposed shifting of the burden of low gas prices to royalty owners. Obviously, because the lessee/producer is entitled to the greater share of production, the lessee/producer bears the far greater part of any "burden" created by a low price. Nor is there any unfairness in limiting the royalty owner to the contracted-for percentage of the amount received by a lessee, who incurs all of the risks and expenses in producing the gas. This fairness issue is irrelevant, however. Interpretation of the NGPA, which is concerned with regulation of natural gas prices, cannot legitimately turn on the fairness or not of the effects of any price for royalty owners. The statute is not addressed to royalty obligations and

CONCLUSION

LL&E fails to present this Court with compelling reasons to devote any portion of its strained resources to review of this narrow issue concerning application of Section 105 of the NGPA. The issue was correctly decided by the state supreme court herein, is pending in only a limited number of lawsuits, and is subject to straightforward analysis based upon legislative language, history and purposes. The Louisiana Supreme Court's interpretation does not conflict with any authoritative executive interpretations. The petition for writ of certiorari filed by LL&E is thus not worthy of this Court's consideration and should be summarily denied.

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only affects the obligations herein by virtue of a judicial decision post-dating enactment of the NGPA, the Louisiana Supreme Court decision in *Shell Oil Company v. Williams,* which held that market value for royalty purposes cannot exceed the federally-regulated ceiling price.